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No. 83-5954

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WAYNE LINDAHL,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

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BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Federal Circuit has jurisdiction pursuant to 28 U.S.C. 1295, 5 U.S.C. 7703, and 5 U.S.C. 8347 to review decisions of the Office of Personnel Management and the Merit System Protection Board taken in violation of statutory and regulatory procedures governing disability retirement of federal employees.

2. Whether the Office of Personal Management and the Merit System Protection Board violated LINDAHL's rights to due process of law by (a) failing to retain Petitioner in federal employment while his claim for disability retirement was pending review in contravention of FPM 831-1 and by (b) imposing the burden of proof on LINDAHL at the hearing before the Merit System Protection Board in contravention of 5 U.S.C. 7701(c).

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (A 45-85)[1] is reported at 718 F.2d 391. The decision of the Merit System Protection Board (A 28-41)[2] is unreported.

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit (hereafter "Federal Circuit") was entered on September 22, 1983 (A 45). The petition for a writ of certiorari was filed on December 15, 1983. It was granted on June 18, 1984 (A 87). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

The authority relied upon include the Fifth Amendment to the United States Constitution, 5 U.S.C. 7701, 5 U.S.C. 7703, 5 U.S.C. 8334, 5 U.S.C. 8337, 5 U.S.C. 8347, 28 U.S.C. 1295, 5 C.F.R. 1201.56 and FPM 831-1. (See Appendix to Petitioner WAYNE LINDAHL's[3] brief (hereafter A.B.).

STATEMENT

After working for the Department of the Navy for over ten years, naval officials first notified LINDAHL on September 4, 1979 that they would be discharging him due to his physical disability caused by his bronchitis. The very next day LINDAHL filed for disability retirement. LINDAHL was separated on October 5, 1979 and six months later on April 8, 1979 the Office of Personnel Management (hereafter "OPM") notified LINDAHL that his application for disability retirement was denied. Upon reconsideration it was again denied by OPM

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[1] All references to Joint Appendix will be "A".

[2] Hereafter all references to Merit System Protection Board will be "MSPB".

[3] Hereafter references to petitioner will be "LINDAHL".

on December 4, 1980. LINDAHL appealed to the MSPB. On May 8, 1981 it denied his appeal. LINDAHL then petitioned the Court of Claims on June 10, 1981. The case was transferred to the Federal Circuit on October 1, 1982. Upon motion to dismiss of the OPM, the court dismissed LINDAHL's petition on September 22, 1983.

LINDAHL first worked for the United States Navy in 1944 as an active duty member. He continued there for nine of the ten year period until 1953. In 1968 LINDAHL became a civilian employee for the Navy at Mare Island Naval Support Activity. He was first a welder and in 1972 he became a security guard GS-5 (R.I. 47-53).[4] The major activity of the Navy at Mare Island is the repairing and painting of naval vessels. As a result, there is a considerable amount of sandblasting, spraypainting and use of solvents on the base (R.II. 14-21).

Beginning in September 1975 LINDAHL began to experience problems with his lungs. For the two subsequent years, LINDAHL was treated by his medical doctor, Beverly Allan, for chronic bronchitis on seventeen separate occasions. His cough was uncontrollable and he was often unable to work (R.I. 75-76).

Based on the medical report of his physician that he was totally and permanently disabled due to acute and chronic bronchitis caused by industrial pollutants at his job, LINDAHL applied for a disability retirement annuity on February 21, 1978 (R.I. 102-3). Two medical doctors working for the Navy and Civil Service Commission examined LINDAHL and diagnosed his condition as acute and chronic bronchitis (R.I. 125, 134). One of them, Dr. J. P. Williams, also stated that LINDAHL was disabled for his position (A 2-6).

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[4] R.I. or R.II. refers to Part I or Part II of the Record of the MSPB filed in the Federal Circuit. Part I includes Enclosures 1 to 8 and is the record from OPM and will be designated R.I. Part II is the transcript of the hearing before the MSPB and will be designated R.II.

Nevertheless, on July 28, 1978, the Civil Service Commission denied LINDAHL's first application on the grounds of insufficient evidence to indicate total disability (R.I. 100-101). LINDAHL did not appeal the denial.

In January 1979 LINDAHL was hospitalized for one week due to his condition (A 7-8). On June 26, 1979 Dr. Allan notified LINDAHL's employer in the Navy that he was "incapable of working" due to "pollutants in the work atmosphere" (A 9). As a result, LINDAHL was placed on limited duty status.

On September 4, 1979 LINDAHL was given advanced notice by the Navy that he would be separated due to disability caused by his bronchial condition (A 10-12). In reliance on the action by the Navy, LINDAHL filed a form with the Department of the Navy on September 5, 1979 requesting that he be retired due to his bronchial disability (R.I. 83-84).

On September 17, 1979, the Commanding Officer of the Naval Support Activity notified LINDAHL that he would be separated as a security officer on October 5, 1979 because of physical disability (A 13-14). This was done in violation of Federal Personnel Manual (FPM) Section 831-1 which required that OPM retain an employee in active duty status pending decision on an application for disability retirement (A.B. 14a).

LINDAHL was terminated on October 5, 1979 due to physical disability, In reliance on the disability termination, he filed a formal request for disability retirement on October 9, 1979 (A 17-20).

On April 8, 1980 LINDAHL was notified that his application for disability retirement was disapproved because, "total disability for useful and efficient service in the above position (security officer) is not shown" (A 21-22). LINDAHL then filed for reconsideration.

On May 15, 1980 Dr. Allan, in a medical report, stated that LINDAHL "cannot safely and effectively work in any area that subjects him to pollutants or other irritants," and "he is

incapable of working at Mare Island Naval Shipyard" due to "attacks of severe bronchitis" (A 23-24).

On December 4, 1980 OPM, after reconsideration of LINDAHL's application, stated, "we lack objective medical findings to support a sustained condition of total disability for your position held" (A 27).

On January 5, 1981 the Commanding Officer of Naval Support Activity, Mare Island, stated that LINDAHL was "terminated due to your physical inability to perform in the position" and would not be rehired (R.I. 6).

An application was filed with the MSPB on January 12, 1981. A hearing was held on March 20, 1981 during which the MSPB hearing officer placed the burden of proof on LINDAHL in violation of Section 7701(c) and 5 C.F.R. 1201.56 (A 31). No witnesses or representatives ever appeared for OPM or the Department of the Navy. The only witnesses and evidence were presented by LINDAHL. Five supervisory personnel testified that LINDAHL's bronchitis prevented him from working (R.II passim).

The MSPB ruled against LINDAHL. It stated that 5 U.S.C. 7701(c)[5] and the governing regulation of the OPM, 5 C.F.R. 1201.56(a)(iii), provided "that in appeals before the MSPB, the agency has the burden of proving that its decisions are supported by a preponderance of the evidence . . ." (A 29). However, the MSPB went on to hold that the burden was on LINDAHL to prove by a preponderance of evidence that he was entitled to the disability retirement since he had a better knowledge of his condition (A 30). The MSPB ruled that LINDAHL was not disabled to the extent required for an annuity because he was not totally disabled for useful and efficient service (A 40).

LINDAHL filed an appeal in the Court of Claims on June 10, 1981. On October 1, 1982 the case was transferred to the

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[5] All references to 5 U.S.C. will be by "Section".

Federal Circuit pursuant to the Federal Courts Improvement Act, i.e. 28 U.S.C. 1295(a)(9). The government moved to dismiss on the grounds that judicial review was precluded by Section 8347(c) (A 45-46).

The Federal Circuit granted the government's motion to dismiss for lack of jurisdiction. The court held in banc (plurality of decision of only five of eleven judges and two limited concurring opinions) that 8347(c) precluded judicial review of all decisions of disability retirement of the MSPB, other than those involving forced retirement for mental disability (A 48, 58).

The Court stated that it will not assume jurisdiction to review voluntary disability retirement decisions of the OPM and MPSB even where the petition alleges (1) that the actions of the agency in separating an employee violated their own regulations and (2) the actions of the hearing officer in allocating the burden of proof violated agency regulations and a specific statute (A 54).

The Court held that LINDAHL would be entitled to judicial review of MSPB voluntary disability retirement decisions only if he cited "constitutional infirmity in the legislation governing disability retirement or in the classifications made in the legislation" (A 50).

Next, the Federal Circuit ruled that it is not bound by the Supreme Court decision in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140-141 (1967) and its progency that there is a presumption of judicial review over agency action. It based its ruling on the belief that Section 8347(c) on its face states that MSPB action is final and consequentially unreviewable by the federal courts (A 53-54). It overruled twenty-four years of precedent allowing limited judicial review in this area (A 52).

Next, the Court ruled that Section 7703(a)(1), which provides for appeals for all MSPB decisions to the Federal Circuit, is not applicable. It held that appeals of MSPB decisions on voluntary disability retirement claims are not appealable by claimants or by the OPM (A 56).

There were two concurring opinions. One by Circuit Judge Nichols agreed with the majority, but stated that "my conclusion is that preclusion of judicial review is never absolute in life" (A 69). The other, by Circuit Judge Nies, stated that she joined the majority opinion, but that not all aspects of a disability claim are precluded from judicial review (A 71).

Four other Circuit Judges dissented in two separate opinions. Their position was that prior to 1980, judicial review of disability retirement claims was limited pursuant to the *Scroggins*[6] formula. When Congress amended Section 8347 in 1980, it expanded judicial review in the area of involuntary mental disability retirement. Congress knew that limited review of all MSPB disability decisions was available prior to the amendment. The OPM Director had told two Congressional committees that the prior standard would continue for voluntary disability retirement cases. And Congress had not changed the wording of the finality clause. Therefore, according to the dissent, Congress "intended to preserve that remedy" (A 74).

The dissent also stated that Section 7703(a)(1) provides for review of all decisions of the MSPB, except for those of discrimination. Therefore, Section 7703 controls Section 8347(c). Finally, Section 7701 covers any agency action appealable to the MSPB and all Section 7701 actions are reviewable by the Federal Circuit pursuant to Section 7703 (A 80-82).

SUMMARY OF ARGUMENT

A. The Federal Circuit has jurisdiction to review decisions by the OPM and MSPB for possible legal error, procedural error or failure to follow statutory guidelines in administering employee disability retirement annuities.

There is a recognized duty of Article III courts to require a governmental agency to follow the procedural and substantive framework established in the statutes and the regulations that

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[6] *Scroggins* v. *United States*, 397 F.2d 295 (Ct. Cl. 1968), *cert. denied* 393 U.S. 952 (1968).

are administered by the agency. The courts have the duty to prevent the agency from violating constitutional rights. *Dunlop* v. *Bachowski*, 421 U.S. 560, 567-568 (1972).

Likewise, this Court has consistently held that where a federal executive official has exceeded its statutory authority, the Court will review the action to determine whether the official was acting within the scope of its lawful powers. *Harmon* v. *Brucker*, 355 U.S. 579 (1958).

Administrative action of the executive department in violation of its own regulations establishing procedures for a hearing and review are invalid.

The OPM and Department of the Navy violated their own regulations by separating LINDAHL while the application for disability retirement was pending. Next, at the hearing before the MSPB, the hearing officer placed the burden of proving that the agency's decision was not supported by a preponderance of the evidence on LINDAHL in contravention to Section 7701(c) and federal regulations (5 C.F.R. 1201.56(a)). (A.B. 20a)

These violations were due process violations of LINDAHL's rights and were mandated to be reviewed by the Federal Circuit under the *Dunlop* and *Harmon* principles.

In addition, the right to a retirement annuity is a vested property right that is entitled to the protection of due process requirements. LINDAHL contributed part of his wages to the fund while a federal employee. And under the scheme of the Civil Service Retirement Act, he must be given an annuity if he fulfills the requirements for disability retirement under Section 8337. The courts have general jurisdiction to protect this right. *Leedom* v. *Kyne*, 358 U.S. 184 (1958).

B. The finality language of Section 8347(c) has generally not been regarded as a complete bar to judicial review of determinations of the Civil Service Commission, OPM or MSPB.

1. Instead, Section 8347(c) has been consistently interpreted by all three of those agencies as permitting judicial

review of legal and procedural errors and as barring review only of factual determinations of medical disability. Since 1956, the courts have consistently held that Section 8347(c) limits judicial review of agency disability retirement determinations. It is recognized where there had been a substantial departure from important procedure rights, a misconstruction of governing legislation or some like error going to the heart of administration action.

2. Congress in its recodification of Section 8347(c) has never refuted this interpretation of limited judicial review of disability retirement determinations. Moreover, in the absence of a clearly expressed intent to the contrary, the revision or recodification of a statute by Congress indicates approval of judicial and administration interpretations made prior to its reenactment. The revisions of Section 8347(c) between 1956 and 1978 establish Congressional approval of judicial interpretations of Section 8347(c). *Lorillard* v. *Pons*, 434 U.S. 575 (1978).

3. The legislative history of Congress of the 1980 amendment to Section 8347 indicates that Congress intended to maintain limited judicial review for legal errors of voluntary disability retirement and to expand limited judicial review of actions in the area of forced mental disability retirement to factual and legal determinations made by the agency. At the Congressional hearings both OPM Director Alan K. Campbell and Associate Director Gary Nelson represented to the Congressional committees that judicial review for voluntary disability determinations should continue as it had in the past and be made only for legal errors of the agency, i.e. for procedural error, misconstruction of governing legislature, or error going to the heart of administrative determination. Congress discussed this limited judicial review, and never expressly eliminated it. Congress was also informed of the abuses in the arena of retirement for mental disability as a method of unjustly terminating federal employees. As a result of this knowledge, Congress amended the statute to eliminate this abuse by expanding judicial review of agency initiated mental disability retirement. *Parodi* v. *MSPB*, 690 F.2d 731 (9th Cir. 1982).

C. The Federal Circuit has jurisdiction under Section 7703 and 28 U.S.C. 1295 to review any and all final decisions of the MSPB. The plain wording of these statutes, as well as the legislative history, indicate that there were to be no exceptions to this provision. The effect of the Federal Circuit's decision is to prevent an entire class of citizens from having a forum in which to adjudicate procedural and legal violations by an executive agency. The interpretation of Section 7703 and 28 U.S.C. 1295 which prohibits judicial review is in contravention of the broader principle that the courts will not construe an act in a manner which runs counter to the broad goals that Congress sought to achieve. Congress passed the Civil Service Reform Act to correct abuses of federal employees' rights in the federal system. It also intended to achieve uniformity of decisions by passing the Federal Court Improvement Act. This decision frustrates those goals.

D. Both OPM and MSPB denied important procedural rights to LINDAHL. The MSPB placed the burden of proof on LINDAHL at the hearing in contravention to Section 7701 and 5 C.F.R. 1201.56. In addition, the OPM and Department of the Navy denied LINDAHL the right to continued employment pending determination of his disability retirement by the OPM in violation of FPM 831-1.

LINDAHL was denied his statutory rights and his constitutional rights to due process of law. As such, this Court should reverse the decision of the Federal Circuit, declare that the Federal Circuit has jurisdiction here, order both OPM and MSPB to follow the legislative mandate in Section 7701 and FPM 831-1, send the case back to MSPB for a new hearing and award back pay to LINDAHL from October 5, 1979 to December 4, 1980.

ARGUMENT

I. THE FEDERAL CIRCUIT HAS GENERAL JURISDICTION TO PROTECT THE RIGHTS CONFERRED BY STATUTE AND REGULATION TO FEDERAL EMPLOYEES

A. Congress Granted Two Statutory Rights To LINDAHL Which The Federal Circuit Refused To Protect.

The interpretation of Section 8347(c) and Section 7703 pertaining to disability retirement by the Federal Circuit below raises fundamental constitutional issues that must be resolved. The holding recognized that a right to a retirement annuity was created pursuant to statute of Congress (A 46). However, the court below ruled that Congress has not "specifically *granted* jurisdiction to any court to hear appeals from administration decision on claims for annuity by those who voluntarily retire" (A 53). Nor is there any right, it held, to review legal or procedural errors committed by the administrative agency since "the simplest procedures adopted by the agency will avoid a claim of denial of procedural due process" (A 54-55).

This Court has consistently held that where the absence of jurisdiction of the federal courts would result in the sacrifice of a right created by Congress, then the inference is very strong that the Congress that enacted the right intended the statute controlling general jurisdiction of the federal courts to govern. *Texas & N.O.R.R. Company* v. *Brotherhood of Railway and Shipping Clerks*, 281 U.S. 548 (1930); *Virginia Railway Company* v. *System Federation, No. 40, R.E.D.*, 300 U.S. 515 (1937). "This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *Leedom* v. *Kyne*, 358 U.S. 184, 190; *A.F. of L.* v. *NLRB*, 308 U.S. 401 (1948). Those cases involved the rights of federal employees to collective bargaining as granted by Congress. If the courts failed to give any statutory remedy to enforce the labor act, it would

have robbed the act of its life and prevented its purpose from being realized.

From the earliest time in this century, this Court has held that federal courts have general power of jurisdiction to grant relief against the action of a federal official where the agency involved has exceeded its statutory authority. *American School of Magnetic Hearing* v. *McAnnulty*, 187 U.S. 94 (1902). The interpretation by executive officials of acts of Congress does not bind the federal courts and do not prevent them from reviewing that interpretation or action taken by those officials. *Reeves* v. *Ainsworth*, 219 U.S. 296 (1911). Moreover, action of a federal executive official in discharging federal personnel in contravention of a Congressional act can be reviewed because the case involves the construction of a general statute of the United States. *Patterson* v. *Lamb*, 329 U.S. 539, 542 (1947); *Billings* v. *Truesdale*, 321 U.S. 542 (1944).

In *Harmon* v. *Brucker*, 355 U.S. 579, 581-582 this Court held:

> "Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers . . . The District Court had not only jurisdiction to determine its jurisdiction, but also power to construe the statutes involved to determine whether the respondent did exceed his powers."

In the decision below, there are two statutory provisions that the Federal Circuit chose not to protect. The first concerns the right to an annuity for disability retirement. Under Section 8334, a federal employee contributes 7% of his weekly salary to the retirement fund pursuant to Congressional mandate. This right vests where the employee has five years of continuous employment and is found to be totally disabled. The retiree is then entitled to an annuity paid from the fund.[7] An annuity under the Civil Service Retirement Act has been held to be a vested property right of the annuitant because the

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[7] See Section 8337 (A.B. 12a) and Section 8334 (A.B. 8a).

retiree contributes to it from his (her) salary. It is not a mere gratuity. *Dismuke* v. *United States*, 297 U.S. 167 (1936). Such benefits are merely deferred compensation for employee services. The interest in retirement payments is a property right and protected by the Constitution since it is earned income. *American Postal Workers Union, AFL-CIO* v. *United States Postal Service*, 707 F.2d 548, 554 (D.C. 1983) *cert. denied* ___ U.S. ___ 104 S.Ct. 1594 (1984).

Likewise, the retirement benefits are part of the contractual rights of an employee. Once they vest upon retirement, they are a valid property interest that cannot be taken without just compensation. *Lynch* v. *United States*, 292 U.S. 571, 579-580 (1934).

LINDAHL therefore has a vested property interest in his annuity for disability retirement. It is a right that was conferred by statute and created by the contributions that LINDAHL made to the fund. But the right would be sacrificed if the Federal Circuit decision below is upheld. For it would be a hollow and empty right to an annuity if it could not be enforced in federal court. An inability to challenge agency action taken in violation of statutory or regulatory provisions that resulted in a denial of disability retirement annuity would rob the Civil Service Retirement Act of its vitality and would thwart its purpose. Congress gave federal employees a right to retirement disability and it must have intended that the courts have the power to enforce it.

The second statutory issue concerns the procedural rights that Congress gave to a federal employee at MSPB hearings. The OPM must carry the burden of proof as to the lack of disability of LINDAHL.[8] At the MSPB hearing, the hearing

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[8] Section 7701(c) places the burden of proof on the OPM to show that LINDAHL was not disabled. OPM initiated the separation for disability. The court below in its plurality decision attempts to state that this is a voluntary disability retirement claim. However, the facts show otherwise. The Navy notified LINDAHL that he was

officer failed to place any burden on the OPM. In fact, the OPM did not appear at the hearing by representative. Nor did OPM produce any witnesses or testimony. Instead, LINDAHL had to go forward with the burden of proof. He produced five lay witnesses who all substantiated his inability to carry out his assigned duties due to his chronic bronchitis (R.II. passim).

It is well established that procedural due process prohibits the deprivation of liberty and property. *Board of Regents* v. *Roth*, 408 U.S. 564, 569 (1972). The extent of protection to be afforded to persons by procedural due process is greatly influenced by the grevious loss he (she) may suffer. *Goldberg* v. *Kelly*, 397 U.S. 254, 262-263 (1970).

The concept of the burden of proof and the standard of proof is a concept that is embodied in the Fifth Amendment's Due Process Clause in civil cases. *Santosky* v. *Kramer*, 455 U.S. 745, 754 (1982); *Woodby* v. *INS*, 385 U.S. 276, 285 (1966). The function of the burden and standard of proof in civil cases is "to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Addington* v. *Texas*, 441 U.S. 418, 423 (1978). This reflects how the risk of error should be distributed between the litigants and the weight of the private and public interests involved. *Herman & MacLean* v. *Huddlestone*, ___ U.S. ___, 103 S.Ct. 683, 690 (1983).

Where the government has the burden of proof in civil matters, it must support its allegations by "clear, unequivocal and convincing evidence." *Woody* v. *INS*, 385 U.S. 276, 285.

This Court in *Dismuke* v. *United States*, 297 U.S. 167 ruled that the lower court had jurisdiction to ascertain whether the

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being separated for disability reasons on September 4, 1979 (R.I. 34-35) (A 10). LINDAHL, in reliance, filed for disability retirement after this notice. The concurring opinion by J. Nichols recognized the problem and stated that he agreed with LINDAHL that "the retirement was involuntary" (A 62).

Director of Insurance on a claim by a federal employee for a retirement annuity was contrary to the provisions of the act. The federal court may review such ruling where the agency fails "to follow a procedure which satisfies elementary standards of fairness and reasonableness essential to the due conduct of the proceeding which Congress has authorized." *Id.* at 172.

In this case, the MSPB hearing officer exceeded his statutory powers under Section 7701(c) by misallocating the burden of proof. By transferring the burden from the OPM to LINDAHL, the risk of an erroneous deprivation of private interests was increased. LINDAHL had to prove that he was disabled when the opinion concerning the ability to perform the job is usually in the hands of experts or of his superiors. This is especially true where, as here, the disability termination was involuntary. The risk of error is decreased where the burden of proof is on the OPM. It has more expertise and resources and it has been so designated by Congress in Section 7701(c)(1)(B) and OPM regulations in 5 C.F.R. 1201.56(a)(ii) and (d) (1980) (See A.B. 1a, 20a, 21a).

Should this Court determine that LINDAHL's application for disability retirement was voluntary, it should nevertheless hold that he is entitled to the protections of Section 7701 and 5 C.F.R. 1201.56 to avoid a gross injustice. Under the doctrine of estoppel when one person acts in reliance upon a representation by the government and has changed his position as a result of such reliance, the government is estopped by the conduct of its agents. *Wilbur Nat. Bank* v. *United States*, 294 U.S. 120, 124-5 (1935). Citizens are entitled to a minimum standard of honor and reliability in their dealings with the federal government. *Heckler* v. *Community Health Services of Crawford County*, ____ U.S. ____, 52 U.S.L.W. 4621 (1984).

In this case, the Navy notified LINDAHL that it would be discharging him within one month on September 4, 1979 because of his physical disability. LINDAHL relied on that conduct of his employer and filed a claim for disability retirement annuity the very next day on September 5, 1979 (R.I. 83). He

chose to take the Navy at its word that he was physically disabled. He chose not to contest the Navy's action because he also believed that he was unable to perform his duties because of his severe and chronic bronchitis. Instead, he applied for the disability retirement annuity in reliance on the position of the Navy (R.I. 83-84).

It would be a gross injustice to now allow the OPM to say that LINDAHL is not entitled to the protections of Section 7701, 5 C.F.R. 1201.56 and FPM 831-1 because his action was voluntary. Had he contested the Navy's discharge, he would have been entitled to this protection. OPM should be estopped from taking advantage of LINDAHL's reliance on the Navy's representations to him of his physical disability. It cannot on the one hand say that he is too physically disabled to work and on the other hand, say that he is not physically disabled enough to be entitled to the disability retirement annuity.

The MSPB violated LINDAHL's due process rights by placing the burden of proof upon him. It took the OPM out of the procedural morass. The risks were increased and it caused an incorrect deprivation of private interests.

This fundamental procedural issue is a constitutional issue that the Federal Circuit should have heard and considered. Instead, the Federal Circuit stated in its opinion that LINDAHL can only raise constitutional questions where it involves "infirmity in the legislation governing disability retirement or in the classification made in that legislation" (A 50), and that "allegation of procedural errors are . . . a matter for investigation and legislation by the Congress, not the courts." (A 55).

This decision stands in contravention to over eighty years of decisions of this Court which allow review of executive action taken in excess of the statutory provisions or are in violation of its regulations. Beginning with *McAnnulty* and up to the present, action of the executive branch in violation of constitutional or statutory rights of an individual is subject to judicial review. The finality language of Section 8347(c) does

not prohibit such review since Congress has never indicated that it has prohibited review for statutory or due process violations in this area.

Even one concurring opinion here recognizes the error of the plurality opinion when it states, "We should, however, be more careful than the majority is not to commit us by dictum to extend the preclusion to instances of unconstitutional and void determinations where Congress could not reasonably, in the light of history, have expected the preclusion to be effective" (A 70).

The plurality did extend the limitation on review to include procedural errors in violation of regulations, statutes and the Constitution. As a result, the decision contravenes the principal of judicial review of agency action and is invalid.

B. The Regulations Were Violated By OPM And Review Is Warranted.

Administration action of an executive department taken in violation of its own regulations establishing procedures for a hearing and review are invalid. *United States ex rel Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954); *Service* v. *Dulles*, 354 U.S. 363, 388 (1957). The head of an executive department must comply with its own procedural regulations in discharging an employee. *Vitarelli* v. *Sexton*, 359 U.S. 535 (1959). Actions by executive officials which involve violations of regulations or the Constitution can be reviewed by the federal courts. *Orloff* v. *Willoughby*, 345 U.S. 83 (1953); *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975); *Vander Molen* v. *Stetson*, 571 F.2d 617 (D.C. Cir. 1977).

LINDAHL raised the issue below that the Department of the Navy and OPM violated their regulations under FPM 831-1, S 10-10(a)(6), when it separated him (A 50). This regulation states, "The agency is required to retain an employee in an active duty status pending decision of the Office of Personnel Management, Compensation Group on an agency application for disability retirement . . ." (A.B. 27a). The Navy here in-

itiated the disability separation on September 4, 1979. LINDAHL, in reliance on the agency action, filed for disability retirement annuity on September 5, 1979. The Navy separated LINDAHL on October 5, 1979. The OPM final decision was issued on December 4, 1980 (A 10-12).

Next, LINDAHL raised the issue in both the MSPB and the Federal Circuit that the MSPB incorrectly placed the burden of proof upon him instead of the OPM in violation of its regulations. 5 C.F.R. 1201.56(a) places the burden of proving that the agency's decision is supported by a preponderance of the evidence on the agency. The OPM never even appeared at the MSPB hearing. Instead, the MSPB placed the burden of proof on LINDAHL (A.B. 20a).

These actions affected the basic rights of LINDAHL to due process and were partially responsible for the denial of the disability retirement annuity. They should be reviewable to determine whether the action taken in violation of the regulation was void. The agency cannot be permitted to adopt the simplest procedures to avoid due process violations (A 54-55). To allow such administrative actions to exist without judicial review will permit the agency to ignore the regulations that it adopted to guide its action. This is contrary to all percepts of due process.

In conclusion, the finality language of Section 8347(c) cannot bar judicial review of agency action taken in violation of the Constitution, statutes or agency promulgated regulations. The courts have consistently held that Congress cannot deprive the federal courts of jurisdiction to review agency action that is in contravention of the Constitution, a federal statute, or regulation, even where there is a finality clause in the statute. *Gusik* v. *Schilder*, 340 U.S. 128, 132-133 (1950); *Schlesinger* v. *Councilmen*, 420 U.S. 738, 749 (1975); *Ostereich* v. *Selective Service Board No. 11*, 393 U.S. 233, 237 (1968). The actions of the OPM and MSPB are out of harmony with the statute and the Constitution, and the Federal Circuit should have assumed jurisdiction under its general jurisdiction powers to rule on these issues.

The Third and Eleventh circuit Court of Appeals both held that Congress may not preclude review of allegedly unconstitutional agency action involving disability retirement. *Campbell* v. *OPM*, 694 F.2d 305, 307 (3rd Cir. 1982); *Pitzak* v. *OPM*, 710 F.2d 1476 (10th Cir. 1983).

The LINDAHL decision grates against the concept of limited government that is part of the doctrine of separation of powers. Under our system, the judiciary is the branch of government with the ability and power to make the final decision on statutory and constitutional meaning. The LINDAHL case is a step in the wrong direction. It is an attempt to prevent judicial review of agency violations of the Constitution and statutory provisions. As such, it must be overruled.

II. THE COURT OF APPEALS HAS LIMITED POWER TO REVIEW MSPB DECISIONS ON ALL DISABILITY RETIREMENT CLAIMS UNDER SECTION 8347

A. The Finality Language Of Section 8347(c) Has Been Judicially And Administratively Interpreted To Allow Limited Judicial Review Of Agency Determinations Regarding Disability Retirement.

This Court has repeatedly held that there is a presumption that agency action is reviewable. Judical review of final agency action by a person who has been harmed will not be precluded in the absence of clear and convincing evidence that Congress intended to preclude such review. *Rusk* v. *Cort*, 369 U.S. 367, 379 (1962); *Leedom* v. *Kyne*, 358 U.S. 184.

The earlier positions of this Court requiring judicial review, e.g., *Stark* v. *Wickard*, 321 U.S. 288 (1944), have been reenforced by Congressional passage of the Administrative Procedure Act in 1946 (5 U.S.C. 551-706). This legislation had as its basic purpose judicial review to any person, "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. 702; *Abbot Laboratories* v. *Gardner*, 387 U.S. 136.

The basic purpose of the Act was to insure that agencies would operate efficiently and that disputes between the agency and a grievant would be resolved through the provided framework. This was intended to further the basic purpose of our constitutional government, its system of checks and balances, and to maintain or improve perception of a responsible and responsive government.

The judicial and administrative rulings on Section 8347(c)[9] have permitted limited judicial review. Section 8347(c) has been in existence since 1948, although the present Civil Service Retirement Act made disability retirement possible in 1920.

One of the initial cases on review of agency decision on retirement was *Dismuke* v. *United States*, 297 U.S. 167. The Court there held that it had jurisdicition to review decisions of the insurance commissioner on questions of law, where the administrative officer "exceeds his authority by making a determination which is arbitrary or capricious" or by "failing to follow a procedure which satisfied elementary standards of fairness and reasonableness . . ." *Id.* at 172-173.

This doctrine of limited judicial review of disability retirement claims was adopted by three important Court of Appeals cases decided in 1956, in which the *Dismuke* case was cited. *Ellmore* v. *Bruke*, 236 F.2d 734, 736 ft. 9 (D.C. Cir. 1956), *cert. denied* 352 U.S. 954 (1956); *Smith* v. *Dulles*, 236 F.2d 739, 742 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 955 (1956); and *Murphy* v. *Wilson*, 236 F.2d 737 (D.C. Cir. 1956), *cert. denied* 354 U.S. 955 (1956).

The courts since then have fairly consistently held that Section 8347(c) is not a total bar to all judicial review of agency disability retirement determinations. Instead, the courts have

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[9] Section 8347(c) states: "The Office shall determine questions of disability and dependency arising under this subchapter . . .The decisions of the Office concerning these matters are final and conclusive and are not subject to review." (A.B. 16a)

consistently interpreted Section 8347(c) as barring judicial review only of the evidentiary and medical basis of all determinations concerning disability and dependency. The courts have permitted judicial review in all disability cases "where there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error going to the heart of administrative determination." *Gaines* v. *United States*, 158 Ct.Cl. 497, 502, *cert. denied* 371 U.S. 936 (1962). This was adopted in *Scroggins* v. *United States*, 397 F.2d 295, 297 and is called the *Scroggins* rule or standard of review.[10]

These previous cases all concern questions of disability. But Section 8347(c) also applies to questions of dependency. The courts have consistently held that they are not completely precluded from reviewing agency determinations in this area. *Gentry* v. *United States*, 546 F.2d 343, 354-5 (Ct. Cl. 1976), *rehearing denied*, 551 F.2d 852 (1977); *Jenkins* v. *U.S. Civil Service Commission*, 460 F.Supp. 611 (D.C. 1978).

This Court in *United States* v. *Clark*, 445 U.S. 23, 34 (1980), specifically ruled that it had jurisdiction to review a commission determination on interpretation of a statute concerning dependency and live-in status. Of important significance is the Court's statement:

> "Because we hold that the Civil Service Retirement Act expressly allows the appellee's children to receive survivors' annuities, there is no question that the Court of Claims below had both jurisdiction to entertain their claims and authority to grant recovery. See *United States* v. *Testan*, 424 U.S. 392, 397-398 (1976); *Eastport S.S. Corp.* v. *United States*, 178 Ct.Cl. 599, 606-607, 372 F.2d 1002, 1007-1009 (1967)."

It appears clear that the judicial interpretation of 8347(c) is that the statute does not preclude or bar judicial review. The

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[10] For numerous other citations to cases adopting the *Scroggins* rule, see *Parodi* v. *MSPB*, 690 F.2d 731, 736, and *McCard* v. *MSPB*, 702 F.2d 978, 982 (11th Cir. 1983).

same interpretation has been given to Section 8347(c) by the OPM and MSPB.

The OPM's position on Section 8347(c) in 1980 and prior thereto is that the section does not completely preclude judicial review. OPM Director Alan K. Campbell in a letter on May 4, 1980 to the Chairman of the House Committee on Post Office and Civil Service and a similar letter to the Chairman of the Senate Committee on Governmental Affairs, dated September 25, 1980 stated:

> "We believe that it is reasonable and proper to restrict expanded judicial review to involuntary disability retirements. An employee who voluntarily applies for disability retirement seeks to establish title to benefit granted by law; the Office of Personnel Management is the administrative agency charged under the law with the managerial function of adjudicating disability retirement claims. It is appropriate, therefore, that OPM decisions on voluntary applications be conclusive, reviewable only to determine whether there has been a substantial procedural error, a misconstruction of governing legislation, or some like error going to the heart of the administrative determination."

S.Rep. No. 1004, 96th Cong., 2d Sess., 4-5 (1980). H.R. Rep. No. 1080, 96th Cong., 2d Sess., 7-8 (1980). Both Congressional reports were lodged with this Court as Exhibits 1, 2.

In a hearing before the House Committee on November 27, 1979, the Associate Director of OPM, Gary Nelson, stated that questions of procedure and constitutional issues regarding agency rulings on disability retirement may be raised in the federal court system. See RFEHB Plan, Survivor Benefits and Fitness For Duty Exams; Hearing on H.R. 2510, H.R. 5410, S. 716 Before the Subcommittee on Post Office and Civil Service, 96th Cong., 1st Sess., 4, November 27, 1979. (See Congressional hearing report also lodged with this Court as Exhibit 3.)

In addition, the MSPB has consistently taken the position both before and after the 1980 Amendment to Section 8347(c) that the section is only a limitation and not a bar to judicial

review of commission disability retirement determinations. *Chavez* v. *OPM*, 6 MSPB 343 (1981).[11] The MSPB also stated in its decision on May 8, 1981 to LINDAHL that he has thirty days to petition the Court of Appeals or Court of Claim to review its decision (A 41). Further, MSPB regulations provide that a person adversely affected by a final order or decision of the MSPB may appeal its decision to the federal court for judicial review.[12] The jurisdiction of MSPB also includes "determination relating to disability retirement."[13]

The agency interpretation is very important. The courts are bound by the "principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong."[14] *Red Lion Broadcasting Company* v. *FCC*, 395 U.S. 367, 381-2 (1969). Both OPM and MSPB have construed Section 8347(c) as being a limit only on the factual determination of medical disability in disability retirement cases.

Thus, both judical construction and administrative action have interpreted Section 8347(c) as including a right to judicial review. Judicial deference must especially be given to agency interpretation that the procedural and constitutional aspects of disability retirement decisions are entitled to be reviewed.

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[11] The MSPB there states "Thus, in the Commission's (OPM's) consistent administrative practice, the 'finality clause' of subsection 8347 (c) was construed solely as a limitation upon *judicial* review of commission disability retirement determinations."

[12] 5 C.F.R. 1201.118 (1981).

[13] 5 C.F.R. 1201.3(a) (6) (1981); and 5 C.F.R. 831.1205 (1981).

[14] The MSPB filed an amicus brief in the Federal Circuit in support of LINDAHL on June 1, 1983. Its position in that court was that, "civil service retirement determinations are subject to review by the Board and the Court under the Civil Service Reform Act and that review of this case is not precluded by 5 U.S.C. Section 8347(c)". See Amicus Brief of MSPB, 28.

B. The Legislative History From 1948 To 1978 Supports The Established Judicial And Administrative Construction Of Section 8347(c).

The current finality clause of Section 8347(c) was first added to the Civil Service Retirement Act by the 1948 amendments. It was orignially codified as Section 724 and provided that the Civil Service Commission decisions would be final and conclusive. But the provisions were only applicable to survivorship benefits, since the disability retirement provisions were in a separate section of the Act.[15]

Later, former Section 724(d)(3) was recodified into former Section 2266(c) by Section 401 of the Federal Executive Pay Act of 1956. The section was then placed in the Act's administrative provisions. The only relevant legislative history as to former Section 2266(c) states that "the bill makes no change in existing general administrative provisions." S.Rep. No. 2642, 84th Cong., 2d Sess., *reprinted in* 1956 U.S. Code Cong. and Ad. News, 3725, 3737. It does not appear likely that Congress would enact a provision precluding judicial review of a broad range of administrative determinations that normally would be reviewed by the courts and then state that it was not effectuating any changes.

Later, amendments to Section 2266 were not substantive in nature. In 1966, Public Law 89-554 recodified the provision and placed it into Section 8347(c). In 1978, the Civil Service Reform Act, Pub.L. No. 95-454 (1978) only replaced references to the Civil Service Commission with references to OPM or MSPB. The changes and the legislative history do not indicate congressional intent that judicial review be denied to claimants for disability retirement.

The numerous cases previously cited in which the courts have held that limited judicial review is permitted for disability retirement under Section 8347(c) or its precedessors (Sections

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[15] Section 710-11, 713.

724 and 2266) have dated back to 1956.[16] "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580-581; *Albemarle Paper Company* v. *Moody*, 422 U.S. 405,. 419 (1975); *NLRB* v. *Gullett Gin Company*, 340 U.S. 361 (1950). And either the recodification or the revision of a Congressional act "indicates approval of court interpretations of the statute made prior to reenactment." *Atkins* v. *United States*, 556 F.2d 1028, 1039 (Ct.Cl. 1977) *cert. denied*, 434 U.S. 1009 (1978); *Francis* v. *Southern Pacific Co.*, 333 U.S. 445, 450 (1948).

The 1950, 1966 and 1978 reenactments of Section 8347(c) without significant change, and the numerous revisions to the Civil Service Retirement Act since 1962 show Congressional approval and adoption of the interpretation given to it by the courts that permit limited judicial review of legal error in agency determinations for disability retirement.

Likewise, the principles of statutory constructions which recognize administrative interpretations support the position of judicial review under 8347(c). Both the OPM and MSPB have interpreted that section to permit review. Administrative construction is presumed to be correct under circumstances like those herein where Congress must be regarded as being aware of the administrative construction but, "has not sought to alter that interpretation although it has amended the statute in other respects." *United States* v. *Rutherford*, 442 U.S. 544, 554, ft. 10 (1979).

The plurality decision of the Federal Circuit took the position that Congress intended to preclude review of all disability cases since 1956 (A 48). It held the later amendments also precluded judicial review. It states that, in 1978, "In reenacting section 8347(c) without change, Congress thus provided

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[16] See *Smith* v. *Dulles*, 236 F.2d 739 and ft. 10 in this brief and accompanying text.

that the review process of Section 8347(c) ended at the MSPB level" (A 48).

This interpretation by the Federal Circuit in constructing Congressional intent is contrary to the previously mentioned cardinal principles concerning knowledge by Congress of existing administrative and judicial interpretations of a statute and adoption of those interpretations when it reenacts the statute. The result is quite incorrect—not only does this Federal Circuit fail to recognize that Congress adopted the *Scroggins* formula when it reenacted those provisions in 1966 and 1978, but the Federal Circuit goes a step further and states that Congress intended to preclude judicial review by the reenactment. The legislative history does not spell out this intent of Congress. The ruling is contrary to judicial history, legislative history, and common sense. It would mean that Congress was oblivious to twenty-four years of decisions of the courts and administrators. No such interpretation is possible.

C. The Congressional Amendment to Section 8347(c) By Pub.L. 96-500 And Its Legislative History Do Not Show A Rejection Of The Previous Judicial And Administrative Construction Of This Section.

As previously stated, there is a strong presumption that Congress in enacting any statute does not intend to prohibit all judicial review of agency action. In determining Congressional intent, the beginning point is the statutory language itself. *United States* v. *Erika, Inc.*, 456 U.S. 201 (1982). But the Court must look beyond the specific statute involved and analyze the entire legislative scheme. First, looking to the statutory language of the amendment to Section 8347, it is seen that it provides for judicial review of involuntary disability retirement of federal employees on basis of mental condition.[17] The statutory language fails to state that other disability retirement determinations are not available. And it must be remem-

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[17] Section 8347(d) (2). (A.B. 16a)

bered that the *Scroggins* formula was the law in 1980 when Congress passed the amendment to Section 8347.

The Federal Circuit stated that the plain languge of Section 8347(d) expressly precludes review beyond the administrative process for denial of voluntary disability retirement annuity claims (A 49).

This Court in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 specifically held, "The mere fact some acts are made reviewable should not suffice to support an implication of exclusion as to the others. The right to review is too important to be excluded on such slender and indeterminate intent." But this is exactly what the Federal Circuit did here. It held that because Congress passed legislation in 1978 specifically providing that MSPB review was available for OPM determinations and in 1980 that mental retirement determinations of an involuntary nature are subject to judicial review, there is then an implication that voluntary disability retirement claims are excluded. This is too slender a basis to prohibit judicial review.

Looking at the language of Section 8347(c), it does not provide clear and convincing evidence that Congress intended to bar all judicial review of voluntary disability retirement determinations. Had Congress chose to do that, it could have specifically provided that it was precluding judicial review of all factual and legal questions.[18] The more rational approach is that Congress recognized that there would be continued limited review of procedural error and legal errors of statutory construction for voluntary disability retirement cases, while the amendment itself expanded judicial review of agency initiated mental disability cases to full review under Section 7703. This is supported by the legislative history.

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[18] Congress did this in 38 U.S.C. Section 211 (Veterans Benefits statute); 5 U.S.C. Section 8128 (Federal Employees Compensation); and 42 U.S.C. 1935(j) (Medicare statute) by use of the words "no other official or court of the United States shall have power or jurisdiction to review any such action. . ." 38 U.S.C. 211(a).

This legislation originated in the House Committee on Post Office and Civil Service in 1979. The House Report states that the committee intended to amend the existing provision of Section 8347 to provide for *de novo* court review of agency-filed disability retirement applications based on an employee's mental condition. This was intended to curb the widespread abuses of eliminating employees from the federal agencies by use of involuntary disability retirement for psychiatric reasons. The House Report then states:

> "While the Office of Personnel Management agrees with the committee that it is reasonable and proper to restrict *expanded* judicial review of involuntary disability retirements, OPM would restrict the judicial forum to either the Court of Claims or a United States court of appeals, rather than the district court. In addition, OPM would limit the scope of judicial review and not permit questions of medical fact to be redetermined. It is on this point that the committee strongly disagrees with OPM (Emphasis added.)

H.Rep. No. 1080, 96th Cong., 2d Sess., 3 (1979). (Exhibit 1)

The report then goes on to criticize three Court of Claim decisions[19] because the courts were not permitting a review of the factual determinations of mental disability retirement cases decided by the Civil Service Commissioner (now OPM). The Committee report concludes that the same review of these factual determinations should be made as are made under Section 7703 for discrimination cases, i.e., *de novo* review in federal courts. (Exhibit 1).

Attached to this report of the House of Representatives is the letter of Director of OPM, Alan K. Campbell, where he states that it is proper to expand judicial review to involuntary disability retirement cases under Section 7703, while continu-

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[19] *McGlasson* v. *United States*, 397 F.2d 303 (Ct.Cl. 1966); *Scroggins* v. *United States*, 397 F.2d 295; and *McFarland* v. *United States*, 517 F.2d 938 (Ct.Cl. 1975) *cert. denied* 423 U.S. 1049 (1975).

ing limited judicial review for voluntary retirement cases under Section 8347(c). In addition to the House report, there were two reported meetings of the House Subcommittee on Compensation and Employee Benefits of the Committee on Post Office and Civil Service where the topic was forced retirement/psychiatric fitness for duty exams. The first committee print indicated that the committee believed there was a lack of due process for federal employees who were discharged for mental reasons. First, at the agency level, the employee was forced to be examined by a psychiatrist without any opportunity to respond to the charges. Second, the right of an employee to appeal to the courts had been limited because the Court of Claims imposed an almost impossible burden with the *Scroggins* formula. See Forced Retirement/Psychiatric Fitness For Duty Exams before Subcommittee on Compensation and Employee Benefits of Committee on Post Office and Civil Service, House of Representatives Print No. 95-99, 95th Cong., 2d Sess., (Nov. 3, 1978) 14-16.[20] (Exhibit 4)

At the second committee meeting on the H.R. 2510, Gary Nelson, the Associate Director, Compensation Group, OPM, testifed on November 27, 1979. He stated:

> "Under the Civil Service Reform Act, OPM's disability decisions are subject to de novo hearing by the Merit System Protection Board, which reviews questions of both procedure and disability.
>
> Furthermore, if there are questions of proper procedure or constitutional issues, these questions may be raised in the Federal court system. Only the question of disability itself, which is a medical fact, is actually barred from judicial review by Section 8347(c) . . ."
>
> RFEHB Plan, Survivor Benefit and Fitness-for-Duty-Exams: Hearing on H.R. 2510, H.R. 5410, S.716 Before the Subcommittee on Compensation and Employee Benefits of the Committee on Post Office and Civil Service, 96th Cong., 1st Sess., 4 (November 27, 1979). (Exhibit 3)

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[20] All Congressional reports on H.R. 2510 have been lodged with this Court by LINDAHL on July 27, 1984. (See Exhibits 1 to 4).

In the Senate Report on H.R. 2510, the Governmental Affairs Committee agreed with the substance of the amendment to allow expanded review of agency initiated disability retirements on the basis of mental competency. "The position of the committee is further reenforced by the endorsement of this position by the Office of Personnel Management as set forth later in this report." At the end of the report is the duplicate letter of OPM Director Campbell calling for expanded judicial review of agency initiated mental disability retirements and continued limited review for voluntary disability retirements. S. Rep. No. 1004, 96th Cong., 2d Sess., 4,5. The Senate bill permitted review pursuant to Section 7703 for both factual and legal errors. This was the amendment that became law as Pub.L. 96-500 in 1980.

Thus, the legislative history shows the following. First, that Congress accepted the construction of the statute given by the executive department that is charged with its enforcement. Congress amended the statute based, in part on the OPM's representation that Section 8347(c) already permitted limited judicial review of disability determinations. Second, that Congress was aware of the judicial interpretation of Section 8347(c). This is clear from the many citations in the hearings and report to the *Scroggins* cases of limited judicial review and the necessity to expand it. It intended to continue that existing remedy of limited judicial review for voluntary disability retirements based on its leaving the other portion of the statutory provisions intact.

Third, Congress intended to remedy the abuses for involuntary disability retirement by providing a review of both the factual and legal rulings under Section 7703. This is consistent with limited review under *Scroggins* and Section 8347(c) for all other disability retirements. This is the logical approach gathered by looking at the entire legislative scheme.

For section 8347(c) to have any validity, it is crucial that the distinction between questions of procedure and questions of

disability or medical fact be made, and that the finality language apply only to the latter type of questions.[21]

The Federal Circuit below again ignores these canons of construction of legislative intent to ascertain the meaning of Section 8347(c). It states that Congress did not explicitly adopt *Scroggin*. Further, it states that the legislative history is unclear, therefore it is not controlling. Finally, the court believes it must look only to the statute itself to ascertain Congressional intent.[22] This Federal Circuit failed to really understand the intent of Congress because it failed to sufficiently examine the purpose of the Congressional amendment. The reason that it chose to ignore this legislative history was because it started from a premise that was incorrect. That premise was, first, that there was no presumption of judicial review because of the statutory wording. Second, that courts should not review agency action where Congress has impliedly prohibited review.

Finally, it arrives at its decision that it lacks jurisdiction over agency determination in voluntary disability without any showing of clear and convincing evidence that Congress intended to bar judicial review of agency actions.

The LINDAHL case stands in complete opposition to the decision of the Ninth Circuit in *Parodi v. MSPB*, 690 F.2d 731. That court used a more scientific approach and detailed analysis of Congressional intent after review of the prior history of Section 8347(c) and the 1980 amendments. Its holding was to recognize that the construction of Section 8347(c) which limits judicial review rather than barring it, is more consistent with the presumption that favors judicial review of agency action. It also held that the amendment gave courts the power to review the facts in the area of involuntary retirement for mental

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[21] See Amicus Brief of Walter E. Riggs, filed by H.R. Bucholtz, Esq. in the Federal Circuit in LINDAHL below.

[22] There are certain references in the Senate and House report that states that there is no judicial review of disability retirements. However, where this is construed to mean *de novo* judicial review, it becomes much clearer.

reasons, thus expanding review. *Parodi* v. *MPSB*, 690 F.2d 731.

Other courts have also recognized that there is nothing in Section 8347(c) which shows by "clear and convincing evidence of a legislative intent that all judicial review of administrative disability determinations be barred." *McCard* v. *MSPB*, 702 F.2d 978, 981 (11th Cir. 1983); *Pitzak* v. *OPM*, 710 F.2d 1476. These courts recognize that the sole purpose of the amendment was to expand judicial review of factual finding in certain disability cases, and that cannot negatively imply that Congress intended to strip employees of *Scroggin* type review in other cases. *Turner* v. *OPM*, 707 F.2d 1499, 1503 (D.C. Cir. 1984); *Scarborough* v. *OPM*, 723 F.2d 801, 810 (11th Cir. 1984).[23]

Thus, this Federal Circuit decision is contrary to legislative intent, contrary to nearly fifty years of judicial decisions, contrary to administrative interpretations by OPM and MSPB, and contrary to the statutory construction principles enunciated by this Court. As such, the decision should be reversed.

III. THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT HAS JURISDICTION PURSUANT TO 28 U.S.C. 1295 AND SECTION 7703 TO REVIEW DECISIONS OF MSPB FOR DISABILITY RETIREMENT

A. The Language Of Section 7703 And Its Legislative History Show That The Federal Circuit Has Jurisdiction Here.

Chapter 77 of the Civil Service Reform Act was intended to control all matters within the appellate jurisdiction of the

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[23] The other decisions rejecting court jurisdiction over MSPB decisions first misread the legislative reports on Section 8347(c), and second, ignore the important distinction between review of facts and review of law in those reports and the presumption of review of agency action. *Morgan* v. *OPM*, 675 F.2d 196 (8th Cir. 1983); *Campbell* v. *OPM*, 694 F.2d 305 (3rd Cir. 1982); *Chase* v. *OPM*, 695 F.2d 790 (4th Cir. 1982); *Hackett* v. *OPM*, 721 F.2d 580 (6th Cir. 1983).

MSPB.[24] Section 7701 provides that an employee may appeal any agency action to the MSPB.[25] And the denial of disability retirement was an action that was appealable to the MSPB under Section 8347(d). Congress, by the plain language of Section 7703(b)(1), provided for judicial review of any employee aggrieved by a final order of the MSPB.[26]

The legislative history is also clear. It states that the amendment to Chapter 77 by Section 205 "makes important changes in the procedures governing review by the Board and the courts of adverse actions, such as removals, and other appealable actions taken by an agency." S.Rep. No. 969, 95th Cong., 2d Sess., 51, *reprinted in* 1978 U.S. Code Cong. & Ad. News, 2775, 2773. Likewise, the history states that Section 7703(a) (formerly section 7702(a)) "applies to judicial review of *all* final orders or decisions of the Board. . . ." *Id.* at 62, *reprinted in* 1978 U.S. Code Cong. & Ad. News, at 2784. (Emphasis added).

The Civil Service Reform Act provided a basis for the reorganization to remedy inequities in federal employment. Congress intended to eliminate Civil Service Commission jurisdiction over appellate responsibilities in disputes over hiring, discipline, restoration rights and retirement benefits. (H.R. Rep. No. 1396, 95th Cong., 2d Sess., 10-11 (1978)). The MSPB was substituted for the Commission, including for cases arising under Section 8347(d).

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[24] Civil Service Reform Act of 1978. Pub.L. No. 95-454, 92 Stat. 1111 (1978).

[25] Section 7701 states: "(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation." (A.B. 1a-5a).

[26] Section 7703 states: "(a) (1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision." (A.B. 6a-7a).

All hearing procedures for MSPB appeals were codified in Section 7701 replacing Civil Service Commission regulations. More extensive appeal rights were provided to appellants from OPM actions, including a right to hearing in disability retirement cases.

The Civil Service Reform Act also eliminated review of Commission decisions by the District Courts. Jurisdiction was transferred over all appeals originally to the Court of Appeals and the Court of Claims. This right to review was subsequently transferred to the Court of Appeals for the Federal Circuit by the Federal Courts Improvement Act of 1982.[27]

The MSPB has held in *Chavez* v. *OPM*, 6 MSPB 343 that Section 7701 applies in disability retirement cases because that section is the only source of jurisdiction for appeals.

Numerous Courts of Appeal have recognized jurisdiction to hear appeals pursuant to Section 7703 over MSPB decisions on reemployment rights,[28] reduction in force,[29] and disability retirement.[30]

Likewise, the Federal Circuit has held that the jurisdiction that the MSPB has over appeals under Section 7701 corresponds with the jurisdiction which the Federal Circuit has under Section 7703. It held all Section 7701 appeals must go to the Federal circuit. *Rosano* v. *Department of the Navy*, 699 F.2d 1315, 1318 (Fed. Cir. 1982).

Section 7703 embodies the judicial presumption that agency action is subject to review. But the Federal circuit refused to

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[27] Pub.L. No. 97-164 (1982); 28 U.S.C. 1295. It provides: "(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction-. . .(9) of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b) (1) and 7703(d) of title 5 (5 U.S.C. Section 7703(b) (1), (d))."

[28] *Raicovich* v. *U.S. Postal Service*, 675 F.2d 417 (D.C. Cir. 1982).

[29] *Horne* v. *MSPB*, 684 F.2d 155 (D.C. Cir. 1982).

[30] *Turner* v. *OPM*, 707 F.2d 1499.

follow this presumption. It found to the contrary that there is no presumption and that Section 7703 does not apply. Instead, it found that Congress never intended judicial review in this area of voluntary mental disability retirement claims or physical disability retirement claims (A 48).

The courts have allowed review of agency decisions under Section 7703(c) based on the substantial evidence test. The courts reviewing agency decisions under Section 8347(c) as construed by *Scroggins* allow review of legal and procedural errors, and errors going to the heart of the administrative process. *McCard* v. *MSPB*, 702 F.2d 978; *Pitzak* v. *OPM*, 710 F.2d 1476, 1478.

This construction, and not that of the Federal Circuit appeal below overruling *Scroggins*, which limits rather than bars judicial review, is more consistent with the presumption favoring judicial review of agency determination. *Parodi* v. *MSPB*, 690 F.2d 731, 735.

But even more important, there was no clear and convincing evidence of a contrary legislative intent against judicial review as the court below ruled. The Congressional history of the Civil Service Reform Act showed that Congress provided for a grant of review of all MSPB decisions under Section 7703. It did not exclude any, except for those of discrimination. Congress gave plenary power to the Federal Circuit to review.

The purpose of Congress in enacting the Civil Service Reform Act was to preserve the merit system, to protect federal employees and their statutory rights from violation by their employer, and to protect those rights in a review process which insures consistent decisions. 5 U.S.C. 1101(5); S.Rep, No. 969, 95th Cong., 2d Sess., 32, 42, 52, *reprinted in* 1978 U.S. Code Cong. & Ad. News, 2728, 2740, 2774. Under this Act, the MSPB was empowered to make conclusive factual findings while the courts were to have jurisdiction over legal and procedural errors and to review the record for substantial factual errors. *Id.* at 62, *reprinted in* 1978 U.S. Code Cong. & Ad. News at 2784.

The Federal Circuit decision in LINDAHL frustrates Congressional intent because it prohibits judicial review of MSPB decisions of any physical disability retirement cases and any voluntary mental disability retirement cases. At present, there is no avenue of judicial relief for those persons who are unfairly treated by an agency, or who have been denied procedural or legal rights in the administrative process. The availability of judicial review is part of our system and values. Without it, there is no protection against executive abuses.

The Federal Circuit was unable to reconcile the apparent conflict between Section 7703 granting power of review and Section 8347(c)'s limiting the power of review. The plurality decision concentrated on Section 8347(c) and held it controlled over Section 7703 and barred judicial review of all voluntary disability retirement cases. It fell victim to relativism. It failed to recognize the broad authority of the Federal Circuit to review as set forth in Section 7703(a)(1). It sets itself beyond that section. Likewise, it prohibits OPM from petitioning for a review of any MSPB decision despite the express language of Section 7703(d). It slamed the courthouse door on individuals and OPM alike in Section 8347 cases involving physical disability retirement claims.

This ruling is also contrary to the rule of law of this Court that provides that "when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intent to the contrary to regard each as effective." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974); *Pitzak* v. *OPM*, 710 F.2d 1475, 1479. The anomaly created by the plurality is obviated by regarding both Section 7703(a)(1) and Section 8347(c) as effective. Both statutes are capable of coexistence. This intent of Congress is to give full review of forced mental disability retirement cases arising under Sections 7703 and 8347(d) while limited judicial review under 8347(c) in physical disability retirement cases. This will preserve the duty of the courts to require an executive agency to follow its statutory and regulatory framework.

B. The Congressional Policy In The Federal Court Improvement Act Is Frustrated By The Federal Circuit Decision.

Congress passed the Federal Courts Improvement Act in 1982. By that statute, Congress sought to obtain uniform decisions in civil service matters by placing review of all MSPB decisions, except for discrimination, in the Federal Circuit. Congress sought to eliminate "inconsistent decisions on the same issues" and to prevent different review where "courts apply the law unevenly when faced with the facts of individual cases." S.Rep. No. 275, 97th Cong., 2d Sess., 2 (1981) *reprinted in* 1982 U.S. Code Cong/ & Ad. News, 2, 3, 12, 13.

But this goal of uniformity would be undermined by the Federal circuit's decision in LINDAHL. Persons who are aggrieved would be forced to seek review of MSPB retirement decisions either in the claims court or the district courts. The Federal Circuit does not have appellate jurisdiction over district courts. Thus, uniformity would be frustrated.

Likewise, the Federal Circuit below prevents the need for consistency of decision in federal employee cases from being achieved. The effect is to foreclose a new forum that Congress intended to be utilized by federal employees. Congress gave the Federal Circuit the power and it must exercise its jurisdiction under 28 U.S.C. 1295(a)(9) and Section 7703(b)(1) to review all MSPB decisions for disability retirement. This Court should reverse LINDAHL and grant the relief requested.

IV. THE MSPB AND OPM DENIED LINDAHL HIS RIGHTS TO DUE PROCESS

A. The MSPB Violated Due Process Rights By Failing To Follow The Statutory Burden Of Proof.

In all cases before the Merit Systems Protection Board, ". . . the decision of the agency shall be sustained . . . *only* if the agency's decision . . . is supported by a preponderance of the evidence." 5 U.S.C. 7701(c)(1)(B).

The hearing before the MSPB is a *de novo* hearing. *Shannon* v. *United States Civil Service Commission*, 621 F.2d 1030, 1031 (9th Cir. 1980); *Doe* v. *Hampton*, 566 F.2d 265, 272 (D.C. Cir. 1977).[31] The hearing must not be a rubber stamp, but must concern itself with the record as a whole. *Kowal* v. *United States*, 412 F.2d 867, 870 (Ct.Cl. 1969).

Cases before the MSPB require active participation of the agency involved and justification of its decision. *Bishop* v. *Tice*, 622 F.2d 349 (8th Cir. 1980); *Walker* v. *Washington*, 627 F.2d 541, 544 (D.C. Cir. 1980) *cert. denied* 449 U.S. 994 (1980); *Francisco* v. *Campbell*, 625 F.2d 266, 269 (9th Cir. 1980).

Although the courts will give deference to administrative policy or construction of a statute, they will not be bound by it if the administrative interpretation is clearly erroneous. *Allen* v. *United States*, 571 F.2d 14, 18 (Ct.Cl. 1978); *Hart* v. *McLucas*, 535 F.2d 516, 520 (9th Cir. 1976); *Shannon* v. *United States Civil Service Commission*, 621 F.2d 1030.

Furthermore, the legislative history of the Civil Service Reform Act of 1978 states:

> The most important part of the procedure is the way it allocates the burden of proof, and the standard of proof it adopts.
>
> *Under the provision, as amended, the agency will have the initial burden before the Board of going forward with its case. The bill, as introduced, did not put this initial burden expressly on the agency. The agency action cannot be ultimately upheld under any circumstances unless the agency first makes a prima facie case justifying its action.*

S. Rep. No. 969, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News, 2723, 2766 (Emphasis added.)

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[31] These cases were against the Civil Service Commission which was the precursor of MSPB prior to 1978.

In the present case, the MSPB chose to ignore this legislative mandate and placed the burden of proof on LINDAHL.[8] This is clearly erroneous, and a violation of the due process rights of the petitioner. First, it is in complete disregard of the legislative mandate. Congress in its complete investigation and knowledge of abuses of employee rights by government agencies required the agency to go forward with proof to show that its decision of denying benefits to an application was proper.[9]

Second, the MSPB violated its most fundamental principle that it must objectively view evidence and not be a rubber stamp for the agency. By placing the burden on LINDAHL, and not requring the agency to make a prima facie case, it in effect granted an unfair presumption to the agency that its decision was valid. It was especially important in this hearing since the agency chose not to have a representative or present any testimony at the hearing. In fact, the entire hearing appeared as though the hearing officer was present and represented the agency. He acted in a dual role of hearing officer and representative of the agency by placing the burden of proof on LINDAHL. He never placed any requirement on the agency.

The MSPB unlawfully transferred the burden of proof to LINDAHL unduly prejudicing his due process rights. Its decision must be reversed.

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[8] The burden of proof is especially placed on the agency when it initiates the action. In this case, the facts are clear. The agency initiated the disability separation on September 4, 1979 (A 10). It was only in reliance on that action that LINDAHL filed for disability retirement on September 5, 1979 (R.I. 83). Therefore, the burden was on the agency.

[9] See Argument I regarding due process nature of burden requirement at page 13.

B. OPM And The Department Of The Navy Violated Due Process Rights Of LINDAHL By Discharging Him While His Application For Disability Was Pending.

Action taken by an administrative agency in contravention of its regulations is illegal. *Billings* v. *Truesdale*, 321 U.S. 542, 552-3 (1944).

In *Piccone* v. *United States*, 407 F.2d 866 (Ct. Cl. 1969) the Court of Claims held that a separation accomplished through violation of a controlling regulation is invalid. A naval employee was separated for disability while his appeal from denial of disability retirement was pending. He was separated in violation of Department of Navy regulations which prohibited separation for disability while an application for disability retirement was pending.

FPM Supplement 831-1, Subchapter S10-10(a)(6) states:

> The agency is required to retain an employee in an active-duty status pending decision of the Office of Personnel Management, Compensation Group on an agency application for disability retirement . . . (See A.B. 27a).

As has been previously explained, the agency here initiated the disability separation on September 4, 1979 (A 10).

Thus, the burden was on the Department of the Navy and the OPM to retain LINDAHL after the retirement claim was filed. It refused to do so. Instead, it chose to ignore its own regulations and process LINDAHL for disability-separation.

At the time of the separation it knew that LINDAHL met all of the requirements of S10-10(a) because he had completed five years of service, was totally disabled for useful service in his position, and the disability was not caused by LINDAHL's own misconduct or habits.

The Chief of Police, the Head of Security, and the Captain of the police all testified that in August and September 1979 they knew that there was no place in the security department at Mare Island for LINDAHL. He could not perform his duties due to his medical problems (R.II. 38, 40, 49, 53, 55, 61, 70-74).

The Federal circuit below refused to consider these due process violations by the agency. Instead, it chose to state that it did not have jurisdiction.

This Court should decide this issue and order a new hearing by the MSPB with the burden on OPM and award back pay to LINDAHL from October 5, 1979 to December 4, 1980 for violation of FPM Supp 831-1.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

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Attorney for Petitioner
WAYNE LINDAHL

APPENDIX

APPENDIX

5 U.S.C. 7701

§ 7701. Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

(A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

(d)(1) In any case in which—

(A) the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management is at issue in any proceeding under this section; and

(B) the Director of the Office of Personnel Management is of the opinion that an erroneous decision would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office;

the Director may as a matter of right intervene or otherwise participate in that proceeding before the Board. If the Director exercises his right to participate in a proceeding before the Board, he shall do so as early in the proceeding as practicable. Nothing in this title shall be construed to permit the Office to interfere with the independent decisionmaking of the Merit Systems Protection Board.

(2) The Board shall promptly notify the Director whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section.

(e)(1) Except as provided in section 7702 of this title, any decision under subsection (b) of this section shall be final unless—

(A) a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision; or

(B) the Board reopens and reconsiders a case on its own motion.

The Board, for good cause shown, may extend the 30-day period referred to in subparagraph (A) of this paragraph. One member of the Board may grant a petition or otherwise direct that a decision be reviewed by the full Board. The preceding sentence shall not apply if, by law, a decision of an administrative law judge is required to be acted upon by the Board.

(2) The Director may petition the Board for a review under paragraph (1) of this subsection only if the Director is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office.

(f) The Board, or an administrative law judge or other employee of the Board designated to hear a case, may—

(1) consolidate appeals filed by two or more appellants, or

(2) join two or more appeals filed by the same appellant and hear and decide them concurrently.

if the deciding official or officials hearing the cases are of the opinion that the action could result in the appeals' being processed more expeditiously and would not adversely affect any party.

(g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice,

including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(h) The Board may, by regulation, provide for one or more alternative methods for settling matters subject to the appellate jurisdiction of the Board which shall be applicable at the election of an applicant for employment or of an employee who is not in a unit for which a labor organization is accorded exclusive recognition, and shall be in lieu of other procedures provided for under this section. A decision under such a method shall be final, unless the Board reopens and reconsiders a case at the request of the Office of Personnel Management under subsection (e) of this section.

(i)(1) Upon the submission of any appeal to the Board under this section, the Board, through reference to such categories of cases, or other means, as it determines appropriate, shall establish and announce publicly the date by which it intends to complete action on the matter. Such date shall assure expeditious consideration of the appeal, consistent with the interests of fairness and other priorities of the Board. If the Board fails to complete action on the appeal by the announced date, and the expected delay will exceed 30 days, the Board shall publicly announce the new date by which it intends to complete action on the appeal.

(2) Not later than March 1 of each year, the Board shall submit to the Congress a report describing the number of appeals submitted to it during the preceding calendar year, the number of appeals on which it completed action during that year, and the number of instances during that year in which it failed to conclude a proceeding by the date originally announced, together with an explanation of the reasons therefor.

(3) The Board shall by rule indicate any other category of significant Board action which the Board determines should be subject to the provisions of this subsection.

(4) It shall be the duty of the Board, an administrative law judge, or employee designated by the Board to hear any proceeding under this section to expedite to the extent practicable that proceeding.

(j) The Board may prescribe regulations to carry out the purpose of this section.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 530; Pub.L. 95-454, Title II, § 205, Oct. 13, 1978, 92 Stat. 1138; Pub.L. 96-54, § 2(a)(45), Aug. 14, 1979, 93 Stat. 384.

5 U.S.C. 7703

§ 7703. Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be the named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision issued by the Board under section 7701. In review of a final order or decision issued under section 7701, the agency responsible for taking the action appealed to the Board shall be the named respondent.

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (h)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

(As amended Pub.L. 97-164, Title I, § 144, Apr. 2, 1982, 96 Stat. 45.)

5 U.S.C. 8334

§ 8834. Deductions, contributions, and deposits

(a)(1) The employing agency shall deduct and withhold 7 percent of the basic pay of an employee, 7½ percent of the basic pay of a Congressional employee, a law enforcement officer, and a firefighter, and 8 percent of the basic pay of a Member. An equal amount shall be contributed from the appropriation or fund used to pay the employee or, in the case of an elected official, from an appropriation or fund available for payment of other salaries of the same office or establishment. When an employee in the legislative branch is paid by the Clerk of the House of Representatives, the Clerk may pay from the contingent fund of the House the contribution that otherwise would be contributed from the appropriation or fund used to pay the employee.

(2) The amounts so deducted and withheld, together with the amounts so contributed, shall be deposited in the Treasury of the United States to the credit of the Fund under such procedures as the Comptroller General of the United States may prescribe. Deposits made by an employee or Member also shall be credited to the Fund.

(b) Each employee or Member is deemed to consent and agree to these deductions from basic pay. Notwithstanding any law or regulation affecting the pay of an employee or Member, payment less these deductions is a full and complete discharge and acquittance of all claims and demands for regular services during the period covered by the payment, except the right to the benefits to which the employee or Member is entitled under this subchapter.

(c) Each employee or Member credited with civilian service after July 31, 1920, for which retirement deductions or deposits have not been made, may deposit with interest an amount equal to the following percentages of his basic pay received for that service:

	Percentage of basic pay	Service period
Employee	2½	August 1, 1920, to June 30, 1926.
	3½	July 1, 1926, to June 30, 1942.
	5	July 1, 1942, to June 30, 1948.
	6	July 1, 1948, to October 31, 1956.
	6½	November 1, 1956, to December 31, 1969.
	7	After December 31, 1969.
Member or employee for Congressional employee service	2½	August 1, 1920, to June 30, 1926.
	3½	July 1, 1926, to June 30, 1942.
	5	July 1, 1942, to June 30, 1948.
	6	July 1, 1948, to October 31, 1956.
	6½	November 1, 1956, to December 31, 1969.
	7½	After December 31, 1969.
Member for Member service	2½	August 1, 1920, to June 30, 1926.
	3½	July 1, 1926, to June 30, 1942.
	5	July 1, 1942, to August 1, 1946.
	6	August 2, 1946, to October 31, 1956.
	7½	November 1, 1956, to December 31, 1969.
	8	After December 31, 1969.
Law enforcement officer for law enforcement service and firefighter for firefighter service	2½	August 1, 1920, to June 30, 1926.
	3½	July 1, 1926, to June 30, 1942.
	5	July 1, 1942, to June 30, 1948.
	6	July 1, 1948, to October 31, 1956.
	6½	November 1, 1956, to December 31, 1969.
	7	January 1, 1970, to December 31, 1974.
	7½	After December 31, 1974.

	Percentage of basic pay	Service period
Bankruptcy judge	2½	August 1, 1920, to June 30, 1926.
	3½	July 3, 1926, to June 30, 1942.
	5	July 1, 1942, to June 30, 1948.
	6	July 1, 1948, to October 31, 1956.
	6½	November 1, 1956, to December 31, 1969.
	7	After January 1, 1970.

(d) Each employee or Member who has received a refund of retirement deductions under this or any other retirement system established for employees of the Government covering service for which he may be allowed credit under this subchapter may deposit the amount received, with interest. Credit may not be allowed for the service covered by the refund until the deposit is made.

(e) Interest under subsection (c) or (d) of this section is computed from the mid-point of each service period included in the computation, or from the date refund was paid, to the date of deposit or commencing date of annuity, whichever is earlier. The interest is computed at the rate of 4 percent a year to December 31, 1947, and 3 percent a year thereafter compounded annually. The deposit may be made in one or more installments. Interest may not be charged for a period of separation from the service which began before October 1, 1956.

(f) Under such regulations as the Office of Personnel Management may prescribe, amounts deducted under subsection (a) of this section and deposited under subsections (c) and (d) of this section shall be entered on individual retirement records.

(g) Deposit may not be required for—

(1) service before August 1, 1920;

(2) military service;

(3) service for the Panama Railroad Company before January 1, 1924;

(4) service performed before January 1, 1950, by natives of the Pribilof Islands in the taking and curing of fur seal skins and other activities in connection with the administration of the Pribilof Islands;

(5) days of unused sick leave credited under section 8339(m) of this title; or

(6) any period for which credit is allowed under section 8332(l) of this title.

(h) For the purpose of survivor annuity, deposits authorized by subsections (c) and (d) of this section may also be made by the survivor of an employee or Member.

5 U.S.C. 8337

§ 8337. Disability retirement

(a) An employee who completes 5 years of civilian service and is found by the Office of Personnel Management to have become disabled shall be retired on his own application or on application by his agency. A Member who completes 5 years of Member service and is found by the Office to have become disabled shall be retired on his own application. An annuity authorized by this section is computed under section 8339 of this title.

(b) A claim may be allowed under this section only if the application is filed with the Office before the employee or Member is separated from the service or within 1 year thereafter. This time limitation may be waived by the Office for an employee or Member who at the date of separation from service or within 1 year thereafter is mentally incompetent, if the application is filed with the Office within 1 year from the date of restoration of the employee or Member to competency or the appointment of a fiduciary, whichever is earlier.

(c) An annuitant receiving disability retirement annuity from the Fund shall be examined under the direction of the Office—

(1) at the end of 1 year from the date of the disability retirement; and

(2) annually thereafter until he becomes 60 years of age;

unless his disability is permanent in character. If the annuitant fails to submit to examination as required by this section, payment of the annuity shall be suspended until continuance of the disability is satisfactorily established.

(d) If an annuitant receiving disability retirement annuity from the Fund, before becoming 60 years of age, recovers from his disability, payment of the annuity terminates on reemployment by the Government or 1 year after the date of the medical

examination showing the recovery, whichever is earlier. If an annuitant receiving disability retirement annuity from the Fund, before becoming 60 years of age, is restored to an earning capacity fairly comparable to the current rate of pay of the position occupied at the time of retirement, payment of the annuity terminates on reemployment by the Government or 1 year after the end of the calendar year in which earning capacity is so restored, whichever is earlier. Earning capacity is deemed restored if in each of 2 succeeding calendar years the income of the annuitant from wages or self-employment or both equals at least 80 percent of the current rate of pay of the position occupied immediately before retirement.

(e) If an annuitant whose annuity is terminated under subsection (d) of this section is not reemployed in a position in which he is subject to this subchapter, he is deemed, except for service credit, to have been involuntarily separated from the service for the purpose of this subchapter as of the date of termination of the disability annuity, and after that termination is entitled to annuity under the applicable provisions of this subchapter. If an annuitant whose annuity is heretofore or hereafter terminated because of an earning capacity provision of this subchapter or an earlier statute—

(1) is not reemployed in a position in which he is subject to this subchapter; and

(2) has not recovered from the disability for which he was retired;

his annuity shall be restored at the same rate effective the first of the year following any calendar year in which his income from wages or self-employment or both is less than 80 percent of the current rate of pay of the position occupied immediately before retirement. If an annuitant whose annuity is heretofore or hereafter terminated because of a medical finding that he has recovered from disability is not reemployed in a position in which he is subject to this subchapter, his annuity shall be restored at the same rate effective from the date of medical examination showing a recurrence of the disability. The second

and third sentences of this subsection do not apply to an individual who has become 62 years of age and is receiving or is eligible to receive annuity under the first sentence of this subsection.

(f) An individual is not entitled to receive an annuity under this subchapter and compensation for injury or disability to himself under subchapter I of chapter 81 of this title covering the same period of time. This provision does not bar the right of a claimant to the greater benefit conferred by either subchapter for any part of the same period of time. Neither this provision nor any provision of subchapter I of chapter 81 of this title denies to an individual an annuity accruing to him under this subchapter on account of service performed by him, or denies any concurrent benefit to him under subchapter I of chapter 81 of this title on account of the death of another individual.

(g) The right of an individual entitled to an annuity under this subchapter is not affected because he has received a lump-sum payment for compensation under section 8135 of this title. However, if the annuity is payable on account of the same disabiltiy for which compensation under section 8135 of this title has been paid, so much of the compensation as has been paid for a period extended beyond the date the annuity becomes effective, as determined by the Department of Labor, shall be refunded to that Department to be covered into the Employees' Compensation Fund. Before the individual may receive the annuity he shall—

(1) refund to the Department of Labor the amount representing the commuted compensation payments for the extended period; or

(2) authorize the deduction of that amount from the annuity payable to him under this subchapter, which amount shall be transmitted to the Department of Labor for reimbursement to the Employees' Compensation Fund.

Deductions from the annuity may be made from accrued and accruing payments. When the Department of Labor finds that the financial circumstances of the annuitant warrant deferred refunding, deductions from the annuity may be prorated against and paid from accruing payments in such manner as that Department determines. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 572; Pub.L. 90-83, § 1(76), Sept. 11, 1967, 81 Stat. 214; Pub.L. 95-454, Title IX, § 906(a)(2), (3), Oct. 13, 1978, 92 Stat. 1224.

5 U.S.C. 8347

§ 8347. Administration; regulations

(a) The Office of Personnel Management shall administer this subchapter. Except as otherwise specifically provided herein, the Office shall perform, or cause to be performed, such acts and prescribe such regulations as are necessary and proper to carry out this subchapter.

(b) Applications under this subchapter shall be in such form as the Office prescribes. Agencies shall support the applications by such certificates as the Office considers necessary to the determination of the rights of applicants. The Office shall adjudicate all claims under this subchapter.

(c) The Office shall determine questions of disability and dependency arising under this subchapter. Except to the extent provided under subsection (d) of this section, the decisions of the Office concerning these matters are final and conclusive and are not subject to review. The Office may direct at any time such medical or other examinations as it considers necessary to determine the facts concerning disability or dependency of an individual receiving or applying for annuity under this subchapter. The Office may suspend or deny annuity for failure to submit to examination.

(d)(1) Subject to paragraph (2) of this subsection, an administrative action or order affecting the rights or interests of an individual or of the United States under this subchapter may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

(2) In the case of any individual found by the Office to be disabled in whole or in part on the basis of the individual's mental condition, and that finding was made pursuant to an application by an agency for purposes of disability retirement under section 8337(a) of this title, the procedures under section 7701 of this title shall apply and the decision of the Board shall be subject to judicial review under section 7703 of this title.

(e) The Office shall fix the fees for examinations made under this subchapter by physicians or surgeons who are not medical officers of the United States. The fees and reasonable traveling and other expenses incurred in connection with the examinations are paid from appropriations for the cost of administering this subchapter.

(f) The Office shall select three actuaries, to be known as the Board of Actuaries of the Civil Service Retirement System. The Office shall fix the pay of the members of the Board, except members otherwise in the employ of the United States. The Board shall report annually on the actuarial status of the System and furnish its advice and opinion on matters referred to it by the Office. The Board may recommend to the Office and to Congress such changes as in the Board's judgment are necessary to protect the public interest and maintain the System on a sound financial basis. The office shall keep, or cause to be kept, such records as it considers necessary for making periodic actuarial valuations of the System. The Board shall make actuarial valuations every 5 years, or more often if considered necessary by the Office.

(g) The Office may exclude from the operation of this subchapter an employee or group of employees in or under an Executive agency whose unemployment is temporary or intermittent. However, the Office may not exclude any employee who occupies a position on a part-time career employment basis (as defined in section 3401(2) of this title).

(h) The Office, on recommendation by the Mayor of the District of Columbia, may exclude from the operation of this subchapter an individual or group of individuals employed by the government of the District of Columbia whose employment is temporary or intermittent.

(i) The Architect of the Capitol may exclude from the operation of this subchapter an employee under the Office of the Architect of the Capitol whose employment is temporary or of uncertain duration.

(j) The Librarian of Congress may exclude from the operation of this subchapter an employee under the Library of Congress whose employment is temporary or of uncertain duration.

(k) The Secretary of Agriculture shall prescribe regulations to effect the application and operation of this subchapter to an individual named by section 8331(1)(F) of this title.

(l) The Director or Acting Director of the Botanic Garden may exclude from the operation of this subchapter an employee under the Botanic Garden whose employment is temporary or of uncertain duration.

(m) Notwithstanding any other provision of law, for the purpose of ensuring the accuracy of information used in the administration of this chapter, at the request of the Director of the Office of Personnel Management—

(1) the Secretary of Defense or the Secretary's designee shall provide information on retired or retainer pay provided under title 10;

(2) the Administrator of Veterans Affairs shall provide information on pensions or compensation provided under title 38;

(3) the Secretary of Health and Human Services or the Secretary's designee shall provide information contained in the records of the Social Security Administration; and

(4) the Secretary of Labor or the Secretary's designee shall provide information on benefits paid under subchapter I of chapter 81 of this title.

The Director shall request only such information as the Director determines is necessary. The Director, in consultation with the officials from whom information is requested, shall establish, by regulation and otherwise, such safeguards as are necessary to ensure that information made available under this subsection is used only for the purpose authorized.

28 U.S.C. 1295

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(9) of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(d) of title 5 [5 U.S.C. § 7703(b)(1), (d)];

5 C.F.R. 1201.56

§ 1201.56. Burden and degree of proof, affirmative defenses.

(a) *Burden and degree of proof.* (1) Agency: Under 5 U.S.C. 7701(c)(1) the agency action must be sustained by the Board if:

(i) It is brought under 5 U.S.C. 4303 and is supported by substantial evidence; or

(ii) It is brought under any other provision of law or regulation and is supported by a preponderance of the evidence.

(2) *Appellant:* The appellant shall have the burden of proof as to issues of jurisdiction and timeliness of filing.

(b) *Affirmative defenses of the appellant.* Under 5 U.S.C. 7701(c)(2), the Board is required to overturn the action of the agency even where the agency has met the evidentiary standard set forth in subsection (a), above, in any case where the appellant:

(1) Shows harmful error in the application of the agency's procedures in arriving at such decision;

(2) Demonstrates that the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or

(3) Shows that the decision was not in accordance with law.

(c) *Definitions.* For purposes of this section, the following definitions shall apply:

(1) *Substantial evidence:* That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as adequate to support a conclusion that the matter asserted is true.

(2) *Preponderance of the evidence:* That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

(3) *Harmful error;* Error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached. The burden is upon the appellant to show that based upon the record as a whole the error was harmful, i.e., caused substantial harm or prejudice to his/her rights.

(d) *Moving forward.* In cases where action has been taken against an employee by the agency, the agency shall present its case first. The appellant may then present evidence.

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S10-10. Filed-by-agency disability retirement procedures

a. Procedural responsibilities of agency when it considers acting upon deficiencies in an employee's service caused by a possible health problem. (1) *Procedures.* An agency should follow the procedures prescribed by the regulations if the deficiencies in an employee's service, conduct, or attendance are such that removal may be necessary to promote the efficiency of the service, or if the employee's behavior or physical condition is such that it presents a significant disruptive influence or risk to the safety of others in the work environment. These procedures are of two types: those that are *required* and those that are *recommended* as good personnel practices. The required prodecures must be observed in every case. The Civil Service Commission will remand to agencies without action any agency-filed disability retirement case which indicates lack of conformance with required procedures. Failure of an agency to follow recommended procedures will not be cause for remanding or, in itself, a basis for denial of the application. An employee has the right to be represented at any time during these procedures. Hereafter in this section, the word *employee* includes the concept of representative where appropriate, and all rights, notices, etc., are available to representatives.

(2) *Making preliminary decision*

(a) The agency is required to make a preliminary determination that the employee's performance, attendance, or behavior is below the level of acceptability, and on the basis of management evidence, that a health problem exists which could account for the service deficiencies. Management evidence means information obtained from such readily available sources as supervisory observation of job performance, absence from duty, or knowledge of illness, accident, or hospitalization.

(b) It is recommended that supervisors and personnel officials consult informally with the agency medical officer

to explore possible medical solutions to the employee's problems.

(3) *Establishing a prima facie case.* The agency is required to establish a prima facie case in *record* evidence that (a) the employee's service is not useful and efficient (based on performance, attendance, behavior, etc.) and (b) the apparent cause is a mental or physical illness or injury not of a transient nature. The prima facie case will document primarily deficiencies in the employee's service rather than his or her alleged illness or injury. Except where an issue of safety of life or property or an issue of security clearance can be decided only upon the basis of the state of physical or mental health of the employee, to be sufficient, the available evidence should be such that it will warrant consideration of the employee's removal from the service under adverse action procedures if medical findings do not support disability retirement.

(4) *Conducting a counseling session*

(a) It is recommended that, if possible, the agency have a counseling session with the employee to discuss the problem and to inform the employee thoroughly of the advantages and disadvantages of the various alternatives open to him or her before any formal action is initiated. A transcript need not be made of this session. If a counseling session is not held, the reasons should be given in the record. One of the primary purposes of the counseling session is to explore with the employee the possibiltiy of reassignment to another position. An agency should make a conscientious search and should consider the employee's potential value for retraining for a different type of work.

(b) The agencies are reminded that executive branch policy encourages maximum use of the services of the agency coordinators for the employment of the handicapped. Instructions pertaining to reassignment in lieu of disability retirement appear in FPM chapter 306, subchapter 8. The coordinator will also be able to provide information on vocational rehabilitation made available

through the counselors from the various State agencies. The counselor from the State vocational rehabilitation agency can be useful to the employee and the agency in selective placement efforts because of his or her knowledge of disabilities and job requirements, and can make recommendations regarding vocational rehabilitation services. The agency may assist an employee in availing him or herself of the services offered by a vocational rehabilitation agency, but this assistance has no effect on any action taken under instructions in this supplement or related instructions appearing elsewhere in the FEDERAL PERSONNEL MANUAL.

(c) The agency should not overlook the possibilities of transfer of the employee to a position in another agency. An employee's failure to choose reassignment at this time should *not* be considered final. Offers should be held open, if possible, and any other opportunities that arise before the employee's separation should be explored.

(5) *Obtaining medical evidence*

(a) If the counseling session has not made an alternative course of action possible, the agency may direct the employee to report for a fitness for duty examination as instructed by the following paragraphs. If evidence already available is apparently sufficient (preferably in the judgment of a medical officer, particularly when a possible mental illness is indicated) to establish that the deficiencies in the employee's service are caused by disease or injury, such an examination would be unnecessary.

(b) When the agency has decided that available medical evidence is apparently inadequate, the employee's supervisor or other manager familiar with the employee's performance on the job must decide, with the assistance of any available medical advice, whether the possible health problem(s) affecting the employee's service can be evaluated by a general physical examination, an examination by

a specialist in a physical disorder, or a psychiatric examination. If a general physical examination or an examination by a specialist in a physical disorder is indicated, the agency may order an appropriate fitness-for-duty examination, as follows:

(i) A written notice must be prepared to order the employee to report for the examination. This notice must inform the employee of the reasons for the examination. This notice must also provide instructions to the employee on how to participate in the selection of a medical examiner if he or she desires to do so. An employee has the right to be represented, and should be so informed by this notice (see (c)(ii)*1* below).

(ii) If an employee objects to being examined and is unwilling to select a different medical examiner, the agency may consider bringing charges against the employee which may *include* a charge of refusing to report for an examination as directed.

(iii) When a medical examiner is selected and an examination scheduled, all available information pertinent to the employee's possible health problem is presented to the medical examiner named by the agency to serve as background for his examination. Any information presented to the medical examiner is also made available to the employee or a physician designated by the employee in writing for this purpose.

(iv) The medical examiner will be asked to state his or her opinion on whether the employee should be given further testing or examination. Further examination may not be ordered unless recommended by the medical examiner.

(c) If the employee's supervisor or other manager familiar with the employee's performance on the job decides that the behavior of the employee has been such as to raise the possibiltiy that the illness is mental or emotional,

and recommends a psychiatric examination, or if a physical examination was made and the medical examiner recommends a psychiatric examination:

(i) An employee may not be ordered to report for a psychiatric examination unless a majority of a panel of at least three agency officials agree that the circumstances warrant such action.

(ii) If a majority of the agency panel agrees that a psychiatric examination is indicated, such an examination will be ordered as follows:

1 If a psychiatric examination is to be ordered, appointment of a representative is required. An employee may name a representative at any time, but if he or she fails to name one voluntarily, the agency should urge the employee to do so before ordering a fitness-for-duty psychiatric examination and offer him or her assistance by naming the kinds of persons who make good representatives. If the employee does not name a representative at the agency's urging, the agency must appoint a representative who will receive copies of all notices, determinations, decisions, or other written communications issued to the employee under these procedures.

2 A written notice to the employee must be prepared to order the examination as above.

3 If the employee objects to the medical examiner named by the agency, he or she will be asked to submit the names of three to five board-certified psychiatrists to whom the employee would be willing to report. The agency will then select a medical examiner from the list and arrange an examination.

4 When a medical examiner is selected and an examination scheduled, all available information pertinent to the employee's possible health problem is presented to the medical examiner to serve as back-

ground for his or her examination. The agency will make available only to a licensed physician, designated in writing for that purpose by the employee or his or her representative, a full report of the medical evidence in his or her file including a copy of the reported behavior irregularities or manifestations of unsatisfactory service.

5 If the employee refuses to cooperate altogether, the agency must document all instances of alleged behavioral deficiencies on which the decision to order a psychiatric examination was based. This lay evidence may serve as the basis for an agency-filed application for disability retirement in the case of an emotionally disturbed employee.

(d) If the agency selects a representative, it may choose a family member, union officer, veteran's service officer, or if no other representative is available, an employee of the agency. An employee should be chosen as representative only as a last resort and should not be an employee under the jurisdiction of the supervisor initiating the request for disability retirement. An ideal agency panel to consider whether a psychiatric examination should be ordered would include an immediate *supervisor or manager, a personnel official, and an agency medical officer if one is available,* but other officials may be used when necessary. Members of such a panel do not have to actually hold a meeting to reach a decision on the file.

(6) *Duty status.* The agency is required to retain an employee in an active-duty status pending decision of the Office of Personnel Management, Compensation Group on an agency application for disability retirement, except that the agency on the basis of medical evidence may place an employee on leave with his or her consent, or without consent when the circumstances are such that retention in an active-duty status may result in damage to Government property, or may be detrimental to the interests of the Government, or injurious to the

employee, fellow workers, or the general public. If the leave account of the employee is or becomes exhausted, any suspension or involuntary leave without pay must be effected in accordance with applicable laws, Executive Orders, and regulations.

(7) *Making tentative determination.* On the basis of all available evidence, the agency is required to decide whether deficiencies in the employee's service are caused by illness or injury. If not, adverse action procedures may be instituted if warranted. If the agency decides that deficiencies in the employee's service (performance, attendance, behavior, etc.) are established and are caused by disease or injury, it then must notify the employee of this tentative determination that he or she meets all requirements to be retired for disability. The notice must:

(a) Be in writing;

(b) Give reasons for tentative determinations;[1]

(c) Include an explanation of the employee's right to reply orally, or in writing, or both, and to submit affidavits or documentary evidence or both, within a specific reasonable time, but no less than 15 calendar days; instructions for submitting a reply; and an explanation of the right to representation, if a representative has not already been designated;

(d) Advise the employee of the right (or that of his or her physician or representative, or both) to review the case file and to obtain copies of the medical findings at no expense; and

(e) Name the official designated to receive employee's oral reply.